NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CAPITOL HILL DODGE, INC. and
ELLIOT DENNIBERG,

Petitioners

v.

CHRYSLER CREDIT CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

Whether the Court below erred when that Court ordered the enforcement of a purported settlement letter between the parties herein and disregarded overwhelming proof of coercion and duress and the deliberate and illegal conversion of the assets of Petitioners (hereinafter sometimes referred to as "Defendants") ELLIOT DENNIBERG and CAPITOL HILL DODGE, INC. by Respondent (hereinafter sometimes referred to as "Plaintiff") CHRYSLER CREDIT CORPORATION.

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STATUTES:

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TO THE
SUPREME COURT OF THE UNITED STATES

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

CAPITOL HILL DODGE, INC. and ELLIOT DENNIBERG, the Petitioners herein, pray that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on the 14th day of September 1983.

OPINIONS BELOW

The September 14, 1983 Order of the United States Court of Appeals for the District of

Columbia Circuit, whose judgement is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition at A-38. The prior Orders and Opinion of the United States District Court for the District of Columbia, also reprinted in the Appendix, are reported as follows: November 12, 1982 Order of The Honorable John Garrett Penn, United States District Judge, at A-1; November 29, 1982 Order of The Honorable John Garrett Penn, United States District Judge, at A-2; and December 7, 1982 Opinion of The Honorable John Garrett Penn, United States District Judge, at A-4.

JURISDICTION

The Order of the United States Court of Appeals for the District of Columbia Circuit was entered on the 14th day of September 1983. A timely filed Petition for Rehearing was denied on the 13th day of October 1983. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Defendant ELLIOT DENNIBERG invested ONE HUNDRED THIRTY-FIVE THOUSAND DOLLARS ($135,000) in September 1978 to become a partner in CAPITOL HILL DODGE, INC. (Record on Appeal hereinafter "R"-262.) The dealership opened in September 1978 (R-261), and lost money from its inception. In June 1979, DENNIBERG took full control of the dealership and invested an additional FIFTY THOUSAND DOLLARS ($50,000) (R-270). The dealership continued to lose money and by August 1979, it

had been forced out-of-trust by CHRYSLER and CHRYSLER CREDIT in an undetermined amount. An out-of-trust condition occurs when the dealership is unable to pay the amount owing under the wholesale finance line of credit on cars already sold.

CHRYSLER CREDIT commenced this action to recover from Defendants the amount of the undetermined out-of-trust, although the amount due was and never had been determined by anyone (R-1-4).

After the suit was commenced, negotiations took place which resulted in the parties signing a letter Memorandum of Understanding on August 29, 1979 (R-6-9).

The letter Memorandum of Understanding provided that DENNIBERG would either: (a) pay the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000) in cash to CHRYSLER CREDIT CORPORATION and execute a surrender of assets agreement covering the remaining assets of the dealership or; (b) execute a promissory note for the amount of the THREE HUNDRED THOUSAND DOLLARS ($300,000) secured by a deed of trust

for the property located at 816 Connecticut Avenue, N.W., Washington, D.C. (R-6-9). The letter further provided that within ten (10) business days after its date, CHRYSLER CREDIT was required to perform an inventory and accounting of all the new and used vehicles at the dealership which were subject to the financing agreement between CHRYSLER CREDIT CORPORATION and CAPITOL HILL DODGE, INC., and that a copy of said inventory and accounting was required to be furnished to DENNIBERG, and subject to verfication by him before any payment was to be made of any out-of-trust condition (R-8).

DENNIBERG was unable to raise the necessary funds called for in the letter. CHRYSLER CREDIT never performed the new and used vehicle inventory and accounting as required, and DENNIBERG never had the opportunity to verify the inventory and accounting of new and used vehicles, all as he had a complete right to do (R-319-337). No list of vehicles was ever given to DENNIBERG by CHRYSLER CREDIT

until after CHRYSLER CREDIT moved for judgment, and specifically on October 22, 1979 (R-320-322), at Benton's Deposition upon Oral Examination before trial, three days before commencment of the evidentiary hearing before Judge Penn.

At the evidentiary hearing, which began on October 25, 1979, the Defendants presented evidence of coercion and threats which were made by Robert Benton to the Defendant ELLIOT DENNIBERG in order to force him into signing the executory accord. The Defendant DENNIBERG testified that Benton had told him that unless he signed the letter he would be put in jail (R-308-309). This threat was based on the fact that employees of CAPITOL HILL DODGE, INC. had been told by CHRYSLER CREDIT CORPORATION to sell new vehicles without the Certificates of Origin, which they did (R-25). The sale of these cars was in violation of the District of Columbia law because CHRYSLER CREDIT had taken the Certificates of Origin from Defendants and later refused to provide or surrender the Certificates of

Origin when Defendants' customers requested them. These customers were then referred by CHRYSLER CREDIT and Benton to the District of Columbia police authorities, who then held DENNIBERG responsible (R-309-312).

A Charles Cleary of CHRYSLER CREDIT testified before Judge Penn that neither he nor his assistant, Mr. Dellinger, had given a list of the out-of-trust cars to defendants after the audit had been performed, and in response to a question by the Court, Benton, CHRYSLER CREDIT's Branch Manager, testified that to his own knowledge the inventory list was never given to DENNIBERG as required by Paragraph 5 of the letter Memorandum of Understanding (R-368).

DENNIBERG testified that between August 10, 1979 and September 14, 1979 he was informed on different occasions that the amount of the out-of-trust condition varied between ONE HUNDRED FORTY THOUSAND DOLLARS ($140,000) and THREE HUNDRED THIRTY THOUSAND DOLLARS ($330,000) as determined by CHRYSLER CREDIT CORPORATION (R-316, 370-371). Robert

Benton also testifed that on August 8, 1979, the out-of-trust figure for CAPITOL HILL DODGE was ONE HUNDRED SIXTY THOUSAND DOLLARS ($160,000) (R-371) and that a rough draft of the letter Memorandum of Understanding prepared by CHRYSLER CREDIT placed the out-of-trust figure at ONE HUNDRED FORTY-ONE THOUSAND DOLLARS ($141,000) (R-375).

Only after being forced to sign the letter of August 29, 1979, did DENNIBERG learn that CHRYSLER CREDIT had forced unwanted cars on the dealership in order to increase sales in dealerships which were undercapitalized (R-20-32). In order to facilitate the shipment of these cars by CHRYSLER, CHRYSLER CREDIT unilaterally increased the wholesale finance line of credit of CAPITOL HILL DODGE, INC. to TWO MILLION DOLLARS ($2,000,000) (R-25).

At the second evidentiary hearing, on or about the 28th day of May 1981, Defendants introduced (as a result of the express directions of the Court of Appeals in its Remand) the testimony of Paul Smith, a former Dodge

dealer in the Metropolitan Washington, D.C. area who had been the victim of identical threats of jail and other coercion by Robert Benton of CHRYSLER CREDIT (R-650-655). See, R-721-890 for the transcript of all proceedings before Judge Penn on the second hearing held May 28, 1981. The Court again refused to allow Joy Denniberg to testify that her husband had been subjected to threats of jail and other coercion by CHRYSLER CREDIT, even though she had first-hand knowledge (R-405-407).

At the May 28, 1981 hearing, Judge Penn did receive the testimony of attorney Steven Friedman, DENNIBERG's previous lawyer who represented DENNIBERG in the matters leading up to the signing of the letter of August 29, 1979. Friedman further substantiated the threats of jail and other threats made by CHRYSLER CREDIT to DENNIBERG at the time of the negotiation in August 1979 (R-849-884).

Judge Penn also heard testimony from DENNIBERG at the second hearing on May 28, 1981 relative to a tape recording of a telephone conversation between DENNIBERG and

Benton in the Fall of 1979, which further substantiated the coercion and duress under which DENNIBERG had been operating when he signed the letter of August 29, 1979 (R-891-912). The tape recording was introduced, listened to and received into evidence on May 28, 1981 (R-749-763, 891-912).

After completion of the hearing on May 28, 1981, Findings of Fact and Conclusions of Law were prepared and filed by all parties (R-685-720). Thereafter no decision or other notice was ever received from the Court from May 28, 1981, until November 12, 1982, when the Orders of the United States District Court for the District of Columbia, granting Plaintiff's Motion for Judgment on the Pleadings and Specific Performance and denying Defendants' Motion for Default Judgment were received (R-1087-1088). Prior to November 1982, CHRYSLER CREDIT's lawyers attempted to urge Judge Penn to schedule a Status Conference, but to no avail (R-1214-1215).

At no time were any arguments of counsel ever heard by the United States District Court

for the District of Columbia on any of the many Motions that had been filed (mostly by Defendants) over the three (3) years that the above action had been pending before Judge Penn. In particular, Defendants were never allowed to be heard in connection with Defendants' Motion for Default Judgment, although a hearing on said Motion was expressly requested by Defendants' counsel (R-952-1042).

THE RULINGS BELOW:

On or about the 17th day of August 1979, Plaintiff CHRYSLER CREDIT CORPORATION commenced the above-entitled action to recover money damages and injunctive relief against Defendants CAPITOL HILL DODGE, INC. and ELLIOT DENNIBERG for the alleged sale of automobiles by Defendants in violation of trust receipts executed by Defendants (R-1).

On or about the 29th day of August 1979, an alleged settlement letter was signed by the parties herein (R-6-9). When Defendants were unable to perform pursuant to that letter, due to duress, coercion, mistake and fraud on the part of Plaintiff, Plaintiff moved on or about

the 4th day of October 1979 for entry of judgment and specific performance of that settlement agreement (R-10).

On or about the 15th day of October 1979, Defendants opposed Plaintiff's Motion for Entry of Judgment and Specific Performance, answered and counterclaimed against Plaintiff's Complaint. On or about the 22nd day of October 1979, the Depositions Upon Oral Examination of Defendant ELLIOT DENNIBERG and Robert Benton, Plaintiff's Branch Manager and employee, were held.

An evidentiary hearing was held on the 25th and 26th days of October 1979 before The Honorable John G. Penn, United States District Judge for the District of Columbia (R-251-533). At that time, the United States District Court for the District of Columbia refused to allow Defendants to present the testimony of one Paul Smith, a former Dodge dealer who was coerced and threatened by Plaintiff in a manner indentical or very similar to Defendants (R-396-405). At that hearing on the 26th day of October 1979 (R-432-434, 483) and again on

papers on the 30th day of October 1979, (R-534-536), Defendants moved the United States District Court for the District of Columbia to compel Robert Benton to answer questions certified at Benton's October 22, 1979 deposition. Plaintiff opposed Defendants' Motion (R-537-541).

On or about the 14th day of January 1980, the United States District Court for the District of Columbia filed an Order and Memorandum Opinion granting Plaintiff's Motion for Entry of Judgment and Specific Performance of the alleged settlement letter and denied Defendants' Motion to Compel answers to questions certified at the deposition of Robert Benton on the grounds that said Motion was not made within a reasonable time (R-542-545). Defendants immediately appealed from the Order of the United States District Court for the District of Columbia dated January 14, 1980, and posted a supersedeas bond which remains in effect in the amount of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000) (R-546, 648-649).

On or about the 5th day of March 1981, the United States Court of Appeals for the

District of Columbia Circuit reversed the Order of the United States District Court for the District of Columbia dated January 14, 1980, and remanded on the grounds that the United States District Court for the District of Columbia had failed to set forth findings adequate to permit judicial review and that the United States District Court for the District of Columbia had erred when that Court excluded the testimony of Paul Smith at the evidentiary hearing on the 25th and 26th days of October 1979 (R-650-655).

On or about the 28th day of May 1981, the United States District Court for the District of Columbia allowed Defendants to present additional testimony, including the testimony of Paul Smith (R-721-912), at a second evidentiary hearing. Mr. Smith was reluctant to testify because he had a franchise application pending with CHRYSLER CORPORATION, Plaintiff's parent, and did not think it would do him any good to testify against Plaintiff (R-834). Plaintiff's attorney, Mr. Coyne, advised the Court of Mr. Smith's unwillingness to testify

and of Mr. Smith's call to Mr. Robert Benton of CHRYSLER CREDIT asking for Mr. Benton's advice on whether or not to testify (R-742). Although under Court Order to appear, Mr. Smith arrived at Court several hours late and only after conferring with his attorney, John Kilcarr, who advised him that a bench warrant would be issued if he id not appear (R-820-837). Paul Smith testified that, like the Defendant ELLIOT DENNIBERG, he had been threatened with criminal prosecution by Robert Benton on behalf of Plaintiff and that Robert Benton had attempted to coerce him into signing a letter similar to the letter which Plaintiff alleges to be a settlement agreement between the parties herein (R-767-837).

On or about the 10th day of November 1981, Defendants moved the United States District Court for the District of Columbia to enter judgment by default against Plaintiff for Plaintiff's failure in all respects to respond to Defendants' Counterclaims (R-952) for in excess of two (2) years.

On the 12th day of November 1982, the United States District Court for the District

of Columbia filed an Order denying Defendants' Motion for Judgment by Default (R-1087). On the 29th day of November 1982, the United States District Court for the District of Columbia filed an Order again granting Plaintiff's Motion for Entry of Judgment and Specific Performance of the alleged settlement agreement (R-1088). That Court set forth its reasoning in a Memorandum Opinion filed on the 7th day of December 1982 (R-1089-1112).

Defendants immediately appealed from the Orders of the United States District Court for the District of Columbia dated November 12 and 29, 1982 (R-1113-1115). On or about the 14th day of September 1983, after oral argument and the submission of papers by all parties herein, the United States Court of Appeals for the District of Columbia Circuit affirmed both Orders of the United States District Court for the District of Columbia and incorporated the reasoning set forth in the Memorandum Opinion of the United States District Court for the District of Columbia dated December 7, 1982, in the judgment entered by the Court of

Appeals for the District of Columbia Circuit (A-38). Defendants' Petition for Rehearing was denied on or about the 13th day of October 1983 (A-40; A-41).

REASONS FOR GRANTING THE WRIT

The Orders dated November 12 and 29, 1982 and Memorandum Opinion dated December 7, 1982 of the United States District Court for the District of Columbia were deficient in numerous respects and should not have been the basis of reasoning for the United States Court of Appeals for the District of Columbia Circuit. The United States District Court for the District of Columbia abused its discretion by erroneously ignoring all evidence of duress, coercion and fraud presented by Defendants even though that evidence was substantially more credible than any evidence presented by Plaintiff.

The Court of Appeals for the District of Columbia Circuit, in an Order and Memorandum Opinion filed the 5th day of March 1981, directed the United States District Court for the District of Columbia to hear the testimony

of Paul Smith (R-655), testimony which the United States District Court for the District of Columbia refused to admit as evidence at the hearing on the 25th and 26th days of October 1979 (R-396-405). It was this testimony which the Court of Appeals for the District of Columbia Circuit considered vital to a correct determination of the above action.

> "Smith's testimony, if it indeed indicates that Benton made the same sort of threats to him that DENNIBERG alleged, tends to make defendant's story more credible and Benton's denial less so. Therefore, Smith's testimony is relevant to the proposition that Benton threatened DENNIBERG with criminal prosecution if DENNIBERG refused to settle since such threats might constitute duress sufficient to void a contract. See, 13 Williston on Contracts at 685-694 (1970). Smith's testimony is material as well." (R-654) (Emphasis supplied.)

In accordance with the March 5, 1981 Order and Memorandum Opinion, the United States District Court for the District of Columbia heard the testimony of Paul Smith on or about the 28th day of May 1981 (R-767-837). However, the United States District Court for the District of Columbia completely disregarded that testimony in its findings subsequent

thereto (R-1091, 1095, 1105-1106, 1111-1112) even though Paul Smith, although reluctant to testify (R-820-837), stated time after time that Robert Benton, as agent for CHRYSLER CREDIT CORPORATION, had threatened him with criminal prosecution in the same manner that DENNIBERG was threatened and coerced into signing the alleged settlement letter between the parties herein (R-794, 796-799, 808-809, 817, 819).

The United States District Court for the District of Columbia also heard at that second evidentiary hearing the testimony of Attorney Steven Friedman, Defendant DENNIBERG's attorney at the time of the signing of the alleged settlement letter, and a tape recording of a telephone conversation between Defendant DENNIBERG and Robert Benton in the Fall of 1979 (R-849-884, 891-912). Although this evidence substantiated Defendants' claims of coercion and duress, the United States District Court for the District of Columbia again completely disregarded this evidence (R-1091) and relied upon the self-serving

statements presented by agents and representatives of Plaintiff on which to base its opinion.

Although the March 5, 1981 remand by the United States Court of Appeals for the District of Columbia Circuit ordered the United States District Court for the District of Columbia to hear the testimony of Paul Smith on the issue of duress (R-650-655), the United States District Court for the District of Columbia summarily dismissed the evidence and Defendants' arguments that the economic pressure to which Defendants were exposed constituted duress and coercion. The United States District Court for the District of Columbia failed to perceive and understand that economic pressure, poor business conditions and threats of criminal prosecution do constitute duress and coercion when a party (Plaintiff and its parent, CHRYSLER CORPORATION) creates the stressful situation and then misuses that situation to manipulate another (Defendants herein). Plaintiff used the poor economic conditions which Plaintiff and its

parent, CHRYSLER CORPORATION, created nationwide and locally by shipping unsaleable automobiles to Defendants, inducing Defendant DENNIBERG to invest in an undercapitalized and financially unstable automobile dealership, increasing Defendants' wholesale line of credit without Defendants' knowledge or permission, creating and encouraging the out-of-trust situation, forcing Defendants to sell automobiles without Certificates of Origin, refusing to turn over the Certificates of Origin after automobiles were sold, threatening DENNIBERG with jail and criminal prosecution and divulging Defendant DENNIBERG's home address and telephone number to irate customers and the District of Columbia authorities in order to increase Plaintiff's profits or the financial position of CHRYSLER CORPORATION, Plaintiff's parent corporation. CHRYSLER CORPORATION further exhibited its willingness to inflict duress and coercion by its apparent offering of a dealership to Defendants' witness, Paul Smith, if he did not testify on behalf of Defendant DENNIBERRG (R-849).

In response to Plaintiff's Motion for Entry of Judgment and Specific Performance of the alleged settlement letter signed by the parties herein, Defendants were entitled to adequate opportunity for discovery and to present relevant evidence. The United States District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit have both erroneously prevented Defendants from compelling Robert Benton to answer questions from Benton's October 22, 1979 deposition (R-544), from compelling answers to questions regarding the release given a co-guarantor, Glen Covey (R-89-91), and from presenting the testimony of Joy Denniberg, Defendant DENNIBERG's wife. All of this evidence was relevant and would have further substantiated Defendants' claims.

The deposition of Robert Benton was held pursuant to Court Order on the 22nd day of October 1979. The transcript of that proceeding was provided to Defendants' attorneys on the 24th day of October 1979. On the 25th and 26th days of October 1979, an evidentiary

hearing was held before the Honorable John G. Penn, United States District Court Judge for the District of Columbia. On the 26th day of October 1979, at that hearing Defendants' attorney moved the United States District Court for the District of Columbia for an Order compelling Robert Benton to answer those numerous questions which Benton had refused to answer at the October 22, 1979 deposition (R-432-434, 483). The United States District Court for the District of Columbia eventually admonished Defendants' attorney for failing to move to compel before that time (R-434) but extended Defendants' time to move on papers until the 30th day of October 1979 (R-434, 483). Defendants' attorney proceeded with that Motion at that hearing and on October 30, 1979, submitted that Motion on papers (R-534-536). Said Motion was timely in every respect.

The expectations of the United States District Court for the District of Columbia, with respect to Defendants' Motion to Compel, were wholly unreasonable and severely prejudicial to Defendants. It was impossible for

Defendants' attorney to prepare Motion papers compelling answers to some forty-seven (47) unanswered questions in one evening and also prepare for a two-day evidentiary hearing. Defendants' Motion was made in a reasonable and timely manner, orally at the October 26, 1979 hearing and on papers on October 30, 1979, yet Defendants' Motion to Compel was erroneously and summarily denied by the United States District Court for the District of Columbia as untimely in a footnote to that Court's Memorandum Opinion dated January 14, 1980. The Court of Appeals for the District of Columbia Circuit subsequently affirmed the United States District Court for the District of Columbia in this one aspect of Defendants' defense by summarily and erroneously affirming the United States District Court for the District of Columbia with regard to Benton's unanswered questions.

The United States District Court for the District of Columbia erroneously ignored the reality that the alleged settlement letter signed by the parties herein could not and

cannot be fully performed. The Court of Appeals for the District of Columbia Circuit erred by adopting the District Court's opinion. The alleged settlement letter required an audit by Plaintiff and verification by Defendants within ten (10) business days of settlement (R-8). It is clear that an audit was not performed in ten (10) days. To this date, no mutually agreed upon figure has ever been calculated and there is no credible evidence before the United States District Court for the District of Columbia upon which to make any such calculation.

At present, it is impossible to conduct an audit or verification of the used and new car inventory that existed at Defendant CAPITOL HILL DODGE, INC. on or about the 29th day of August 1979.

At no time herein was it possible for Defendants to convey to Plaintiff a second deed of trust lien against property described as 816 Connecticut Avenue, N.W., Washington, D.C., as security for a THREE HUNDRED THOUSAND DOLLARS ($300,000) promissory note, as

required in Paragraph 1(b) of the settlement agreement (R-7). That property has been at all times held by Defendant DENNIBERG and his wife, Joy Denniberg, as tenants by the entirety. Because Defendant DENNIBERG has at all times been unable to raise the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000) in cash, the option enumerated as Paragraph 1(a) (R-6) has never seriously been considered part of that letter.

Numerous other provisions of the alleged settlement letter are so ambiguous as to render that letter unenforceable, including but not limited to the details of the exchange of mutual releases (R-8) and the methods by which the United States District Court for the District of Columbia can or should arrive at a liquidated amount that CHRYSLER CREDIT CORPORATION claims is due and owing.

The judgement of the United States Court of Appeals for the District of Columbia Circuit filed the 14th day of September 1983 must be reversed and vacated because of the inadequacies of and ambiguities in the Orders

dated November 12 and 29, 1982, and the Memorandum Opinion dated December 7, 1982 of the United States District Court for the District of Columbia upon which the Court of Appeals for the District of Columbia Circuit based its Opinion and Order of September 14, 1982, and the Orders of the United States District Court for the District of Columbia denying Defendants' Motion for Judgment by Default and granting Plaintiff's Motion for Entry of Judgment and Specific Performance of the alleged settlement agreement must be reversed in all respects.

CONCLUSION

WHEREFORE, Petitioners respectfully request that a Writ of Certiorari be granted, that the Orders of the United States District Court for the District of Columbia dated November 12 and 29, 1982 be reversed and vacated, that Plaintiff's Motion for Entry of Judgment and Specific Performance of the alleged settlement letter be denied in all respects, that Defendants be allowed the opportunity for full discovery and for the

presentation of all relevant evidence, that Defendants be allowed their day in Court and a trial by jury and such other and further relief as may be just and proper.

DATED: January 10, 1984

Respectfully submitted,

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0133E

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRYSLER CREDIT CORPORATION,

Plaintiff :

v. :

CAPITOL HILL DODGE, INC.
and ELLIOT DENNIBERG,

Defendants :

FILED

NOV 12 1982

CA 79-2175

O R D E R

Upon consideration of the motion for judgment by default and the opposition thereto; and this Court being fully advised; and it appearing that the Verified Answer upon which defendants base their motion was tendered but not properly filed with leave of Court, it is, by this Court, this 12th day of November 1982,

ORDERED that the defendants' motion for judgment by default be, and the same hereby is denied.

/s/
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRYSLER CREDIT CORPORATION, FILED

Plaintiff : NOV 29 1982

v. : CA 79-2175

CAPITOL HILL DODGE, et al

Defendants :

O R D E R

This case comes before the Court on the plaintiff's motion for entry of judgment to enforce a settlement agreement between Chrysler Credit Corporation and the defendants. After giving careful consideration to the evidence in the case, together with the arguments of counsel, the Court concludes, for the reasons set forth in a Memorandum Opinion, Findings of Fact and Conclusions of Law to be filed herein, that the plaintiff's motion should be granted. In view of the above, it is hereby

ORDERED that plaintiff's motion for the entry of judgment to enforce the settlement agreement between plaintiff and the defendants is granted, and it is further

ORDERED that all other pending motions are denied as moot, and it is further

ORDERED that judgment is entered for the plaintiff and that defendants shall comply with all conditions and requirements of the August 29, 1979 settlement agreement entered into between the parties.

Dated: November 29, 1982

/s/
JOHN GARRETT PENN
United States District
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRYSLER CREDIT CORPORATION

FILED

Plaintiff. : DEC 7 1982

vs. : CA No. 79-2175

CAPITOL HILL DODGE, INC., et al

Defendants :

MEMORANDUM OPINION
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, a corporation engaged in the business of wholesale and retail financing of new and used automobiles for authorized Chrysler - Dodge - Plymouth Dealers, filed this action against the defendants, Capitol Hill Dodge, Inc. (Capitol Hill) and Elliot Denniberg (Denniberg), Vice President of Capitol Hill, to enjoin them from offering for sale any vehicle under trust receipts with plaintiff, to obtain a writ of replevin as to all automobiles in the possession of the defendants under trust receipts with plaintiff, and to obtain judgment against defendants in an amount in excess of $1.2 million dollars.

I

The complaint was filed on August 17, 1979, and on that same date, the Court heard and granted plaintiff's ex parte motion for a temporary restraining order. Although the resulting order was due to expire on August 27, and the Court had scheduled a hearing on plaintiff's motion for a preliminary injunction for the same date, the parties mutually agreed to extend the order since they were discussing the possible settlement of the case. Finally, on August 31, 1979, the parties filed a "Stipulation and Order under which defendants released all vehicles to plaintiff which were the subject of the complaint so that plaintiff could sell those vehicles to the public. Plaintiff agreed to dismiss so much of this action as requested injunctive relief and a return of the automobiles, once the above conditions were met, and the temporary restraining order was immediately dissolved. By agreement, the action was stayed until September 17, 1979, to permit performance by the parties of the separate agreement of settlement dated August 29, 1979.

The separate agreement of August 29, 1979 is in the form of a letter from Denniberg to Robert D. Benton (Benton), Branch Manager of the plaintiff. That letter was prepared and written by Denniberg and agreed to and accepted by Benton on behalf of the plaintiff. Several changes were made in the letter, primarily relating to the date for performance of certain actions, and all changes were seen, initialed and approved by both Denniberg and Benton. When defendants did not comply with the terms of the agreement by September 14, 1979, the plaintiff filed a motion for entry of judgment and specific performance of the settlement agreement. That motion was filed on October 4, 1979.

An evidentiary hearing on the motion was held on October 1979 and on January 14, 1980, the Court filed a Memorandum Order granting the plaintiff's motion and directing defendants to comply with the terms of the settlement. Defendants appealed the order and the Court of Appeals vacated the order of this Court and

remanded the case for further proceedings. Chrysler Credit Corp. v. Capitol Hill Dodge, Inc., No. 80-1145 (March 5, 1981). The appellate court noted that while this Court addressed Denniberg's defense of duress, it did not directly address the other defenses raised by Denniberg namely: (1) lack of intent to contract, (2) nonfulfillment of a condition precedent, and (3) unilateral mistake. The appellate court also ruled that this Court should hear the testimony of Paul Smith, another car dealer who alleged that he was threatened by Benton. This Court had previously excluded that testimony but the appellate court found it admissible under Fed. R. Evid. 404(b).

Upon remand, this Court conducted a further hearing in which it heard the testimony of Paul Smith, Elliot Denniberg, Stephen G. Friedman and George Ball. The Court also received additional exhibits including the tape and transcript of a telephone conversation between Benton and Denniberg. Denniberg taped

that conversation, which was subsequent to the settlement agreement, without the knowledge of Benton.

Since the evidentiary hearing, the defendants have filed a motion for judgment by default on the grounds that the plaintiff failed to file an answer to defendants' verified answer and counterclaim.

II

The sole issue before the Court is whether the purported settlement of August 1979 is valid and enforceable. The plaintiff, of course, relies on the terms of the settlement, while the defendants contend that there was no binding settlement agreement, and that Denniberg entered into the purported agreement because he was under duress. As noted, the defendants also assert that there was a lack of intent to contract, nonfulfillment by plaintiff of a condition precedent, and unilateral mistake.

Before addressing the merits of the purported settlement, the Court finds it necessary to touch upon the motion for judgment by

default filed by the defendant. Defendants' motion is based upon the failure of the plaintiff to respond to the verified answer and counterclaim filed by the defendants in October 1979. Defendants reason that since the plaintiff has failed to answer the counterclaim, they are now entitled to a default judgment. That motion was recently denied by the Court. See Order filed November 12, 1982.

The motion is denied since, until the Court determines whether the parties entered into a valid settlement, there is no need for defendants to answer the complaint, and certainly no need for the plaintiff to respond to the counterclaim. If the plaintiff is correct and all issues in this litigation were settled by the August 1979 agreement, that effectively ends the litigation and all other issues, including those raised in the answer and counterclaim, are moot. On the other hand, if the settlement agreement was not valid, then the parties must go forward and litigate the issues in the case. Under these circum-

stances, defendants' motion for judgment by default must be denied as being premature. Moreover, in view of the ultimate disposition in this case, the motion is moot.

III

It is clear that if the settlement is upheld, such action will be dispositive of all issues in the case. The settlement agreement between the parties is found in two documents filed in this case, one is the Stipulation and Order filed on August 31, 1979, and the second is the Settlement Agreement dated August 29, 1979. Under the terms of the Stipulation and Order, the temporary restraining order was dissolved, and upon completion of certain promises contained within that document, so much of the complaint as sought injunctive relief and an order directing replevin of the subject automobiles was to be dismissed.

The remaining terms of the overall settlement are incorporated in the letter of August

29, 1979. That letter was prepared by or for Denniberg and is addressed to Robert Benton, Branch Manager of the plaintiff. Denniberg alleges that he entered into the agreement due to unlawful pressure, threats and duress from Benton.

Setting aside, for the moment, the question of duress and the other defenses raised by the defendants, a reading of the settlement agreement establishes that the settlement was to settle all and any claims between the parties. The letter was written by Denniberg to stand as a "memorandum of understanding" between defendants and the plaintiff, and refers to Denniberg's conversations with James Brunner, an employee of the plaintiff. In his letter, Denniberg recognizes that the plaintiff had commenced this action and notes that "[a]ll of the parties desire to fully and finally amicably resolve all of the issues which were or could have been raised in this law suit" (emphasis supplied by the Court).

Clearly the intent of the parties signing the above agreement was to settle all issues of the case including matters which were or could have been raised in the complaint, the answer and any counterclaims. Accordingly, if the Court concludes that the settlement is valid, then it may be enforceable unless enforcement would be unconscionable.

The Court finds that the Stipulation and Order and the settlement agreement were signed by Denniberg in his individual capacity and as representative of Capitol Hill. The Court further finds that the purpose of the agreement was to fully settle, once and for all, the litigation which is the subject of this action. The Court also finds that any changes in the agreement were initialed by Denniberg, as well as by Benton on behalf of the plaintiff.

IV

Denniberg claims that he signed the purported settlement agreement under duress or economic duress. "[A]ny threat which deprives

a party to a contract of the free exercise of his will constitutes duress." Rizzi v. Fanelli, 63 A.2d 872, 874 (D.C. Mun. App. 1979) (footnote omitted). See also, Sind v. Pollin, 356 A.2d 653, 656-657 (D.C. App. 1976).

After carefully considering the evidence in this case, including the testimony of Denniberg, Benton, Paul Smith and Stephen Friedman, Denniberg's attorney, the Court finds no evidence to support defendant's claim of duress. Denniberg was not a babe in the business world when he entered into the settlement agreement, or indeed when he purchased his interest in Capitol Hill. He was a business man who operated his own advertising agency. Although his efforts to become involved with Captiol Hill may not have been a wise decision, that is not the issue here. Nor is the issue whether he exercised good business judgment in attempting to settle the case by the settlement agreement of August 1979. As noted Denniberg was a business man who, prior to entry into the settlement agreement had the

opportunity to receive the advice and counsel of two attorneys. Moreover, at the time he purported to settle the case, the action had already been filed and the Court had entered a temporary restraining order. Denniberg had notice of that temporary restraining order on the evening of August 17, 1979. While he was under considerable economic pressure, it was pressure of his own making. Business decisions are often made under pressure, and in this case there is no doubt that Denniberg feared the consequences if the case was not settled, or an agreement reached, but those factors rarely, if ever, amount to duress. Benton in discussing the settlement with Denniberg never threatened prosecution, although it is true that both he and Denniberg discussed the possible ramifications if customers of Capitol Hill were unable to obtain their certificates of origin. When Denniberg advised Benton that he was under considerable pressure from those customers, Benton suggested that Denniberg should seek legal advice from his counsel. Denniberg always had counsel available

and the matter was pending before this Court when the case was settled. The fact that it was pending before the Court is significant in that it certainly suggested to Denniberg that plaintiff was interested in seeking civil relief only since plaintiff had indeed filed an action to obtain that relief.

Denniberg testified that Benton stated that if he, Denniberg, did not sign the agreement, he was going to go to jail, TR I-58*/ but he states that Benton explained that he was referring to the rights of customers to take action, TR I - 59. Denniberg was also concerned about the many complaints from customers but there is no credible evidence that these complaints were somehow initiated or instigated by the plaintiff. TR I - 59. Finally, he refers to one or more

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*/ TR I refers to transcript I relating to the proceedings in 1979, while TR II refers to transcript II relating to the proceedings held after the decision of the Court of Appeals.

conversations he had with a Mr. Gant and Mr. Scott, but those gentlemen, who told him substantially the same thing as Benton, were employed by the District of Columbia Department of Licenses and Inspections, and their actions or comments are not chargeable to the plaintiff. While it is clear he was under pressure, the pressure came from many sources and, apparently, primarily from disgruntled customers.

The Court finds then that neither Benton nor anyone else in the employ of plaintiff brought to bear pressure which would amount to duress which in turn caused Denniberg to enter into a settlement agreement. Rather, the Court finds that he entered into the agreement of his own free will and after he had had a full opportunity to consult with his legal counsel on both the criminal and civil aspects of his decision. Denniberg was never deprived of the ability to exercise his free will and judgment. His claim of duress must therefore be denied, in toto.

Denniberg raises three other defenses. First, he contends that he did not have the intent to enter into the settlement agreement. Everything in the record points to the contrary. As noted, Denniberg was under considerable pressure and was anxious to resolve the dispute as quickly as possible. His attorney Mr. Friedman, testified that Denniberg was anxious to have the necessary papers drawn up as soon as possible. Denniberg's haste was based upon his intent to "fully" and "finally" settle all possible issues and to put this matter behind him. The Court finds that he did have the intent to enter into the settlement agreement and that he was in full agreement with all terms of the proposal. As noted above, he entered into the agreement freely and voluntarily.

Second, Denniberg argues that the settlement is unenforceable because of a unilateral mistake on his part. Again, nothing in the record supports that claim. As the Court has found in its specific findings of fact, Part VIA, infra, Denniberg had access to all of the necessary

information upon which to base his decision to settle the case. This information was known to Denniberg and he had previously discussed it with his attorney. Under these facts, the Court finds as a fact, and concludes as a matter of law, that there was no mistake of facts at the time Denniberg entered the agreement. That contention must be rejected.

Finally, Denniberg contends that the plaintiff failed to fulfill a condition precedent to the settlement, that is, plaintiff failed to inventory the new and used automobiles. Here one must distinguish between a condition precedent on the one hand and a promise to undertake certain action on the other. Bergman v. Parker, 216 A.2d 581, 583 (D.C. App. 1966). Paragraph 5 of the settlement agreement was not a condition precedent and thus there was no nonfulfillment of the condition. Plaintiff promised to take an inventory and later performed that agreement. See Part VIA, infra.

VI

Although the Court has made general findings of fact and conclusions of law as to the defenses asserted by the defendants, see Parts II, III, IV, V, supra, it makes the following specific findings of fact and conclusions of law:

A. Findings of Fact

1. The plaintiff is and was at the commencement of this action a corporation organized and duly existing under the laws of the State of Delaware with its principal place of business in the State of Michigan.

2. The defendant was at the commencement of this action a corporation organized and duly existing under the laws of the District of Columbia with its principal place of business in the District of Columbia and was an authorized Chrysler Plymouth Dodge dealer.

3. The defendant, Elliot Denniberg is and was a citizen of the State of Maryland, serving as Vice President of Capitol Hill, and was a signatory of a Continuing Guaranty with the plaintiff as of October 11, 1978.

4. Denniberg and Capitol Hill executed wholesale promissory notes and trust receipts (security agreements) whereby they promised to pay plaintiff the invoice cost for the vehicles they sold which were initially financed by plaintiff.

5. On or about July 10, 1979, plaintiff learned that the defendants had sold financed vehicles but had failed to repay it the amounts financed.

6. Thereafter, plaintiff demanded payment of the funds owing, but no payments were made.

7. In August of 1979, plaintiff filed the instant suit for injunctive and monetary relief alleging that the defendants had breached a number of their trust agreements by selling automobiles in violation of the terms of those agreements, thereby defeating its interests in the collateral which secured the financing of Capitol Hill's inventory.

8. On August 17, 1979, this Court entered a temporary restraining order which precluded

defendants from selling vehicles. This order was extended by agreement of counsel representing both parties. See Orders filed August 17, 1979 and August 27, 1979.

9. On or about August 30, 1979, Denniberg, on behalf of himself and as vice president of Capitol Hill, and Benton, on behalf of plaintiff, each signed a letter of agreement which was "to fully and finally amicably resolve all of the issues which were or could have been raised . . . ." in this suit.

10. On August 31, 1979, this Court approved a Stipulation and Order by which, inter alia, defendants agreed to return financed vehicles to the plaintiff and to execute a "voluntary return of assets letter." The Order further dissolved the temporary restraining order and stayed proceedings "to permit performance by the parties of their respective obligations under a separate Agreement of Settlement dated August 30, 1979." See Order filed August 31, 1979.

11. On October 4, 1979, plaintiff filed a Verified Motion for Entry of Judgment and Specific Performance of Settlement Agreement seeking to enforce the Agreement of Settlement dated August 29, 1979 which had not been fulfilled by the defendants.

12. On or about October 15, 1979, Denniberg filed an affidavit in opposition to the Motion for Entry of Judgment and tendered an answer to the Verified Complaint.

13. Defendants, who seek to void the settlement agreement on the alleged grounds of fraud, duress and unlawful conduct; contend that the agreement was an unenforceable executory accord; sought to excuse performance because of failure to perform a purported condition precedent; and sought relief from the agreement due to unilateral mistake.

14. On January 14, 1980, this Court ruled that Denniberg had voluntarily signed both the Stipulation and Order, which was filed on August 31, 1979, and the settlement agreement

dated August 29, 1979. The Court specifically ruled that Denniberg in signing the above agreements, did not do so because of duress or unlawful pressure brought to bear by Benton or by anyone else on behalf of the plaintiff but that its decision to settle was voluntarily made by him.

15. On appeal taken by the defendants, the United States Court of Appeals for the District of Columbia Circuit vacated the order filed January 14, 1980 and remanded the case for the taking of additional testimony from Paul Smith and for this Court to explicitly reach conclusions on each of the four substantive defenses raised in the memorandum in opposition to plaintiff's motion.

16. At a subsequent hearing, the Court heard testimony from Paul C. Smith, Stephen G. Friedman, Esquire, George F. Ball, Jr., Esquire, and Elliot Denniberg, and received additional exhibits.

17. Although defendants sought to void the agreement of settlement on the grounds of fraud, illegal conduct and duress, they have only specifically argued that plaintiff and its agent, Robert Benton, pressured Denniberg by causing the out-of-trust condition, increased the Dealer's line of credit and shipped unordered and unwanted vehicles, and permitted cars to be sold without certificates of origin then threatening criminal prosecution.

18. In June 1979 when he took over active management from his partner Glen Covey, Denniberg knew that the dealership was having financial troubles.

19. In July 1979, Denniberg knew that Capitol Hill owed $141,000 to plaintiff as a result of secured vehicles being sold out-of-trust; that is, plaintiff was not being repaid the amounts it had financed.

20. The out-of-trust condition was caused by Capitol Hill's failure to pay plaintiff the amount it financed for each car sold.

21. Even prior to taking over active management of Capitol Hill, Denniberg knew that the dealership was on finance hold.

22. Plaintiff's representatives told Denniberg that the finance hold existed because the dealership owed it money.

23. In late June or early July, Denniberg put $50,000 into the dealership and the hold on financing was taken off although Benton had advised Denniberg not to take over management.

24. Plaintiff did not ship any vehicles to Capitol Hill since it was not the manufacturer but rather a financing company.

25. During the summer of 1979, Capitol Hill received some of the low mileage vehicles it had ordered.

26. After July 10, 1979, plaintiff took possession of the certificates of origin for vehicles it had financed for Capitol Hill.

27. Capitol Hill was to repay the money owed plaintiff after each financed vehicle was sold and the certificates of origin were then to be released to the dealer.

28. A dealer could be subject to criminal sanctions if it failed to promptly deliver the certificates to purchasers of vehicles as Denniberg knew before August 28, 1979, having been so advised by one of his attorneys and by Mr. Gant and Mr. Scott of the District of Columbia government.

29. Neither plaintiff nor its agent Benton, or for that matter, anyone else acting on behalf of the plaintiff, threatened to put Denniberg in jail if he failed to enter into the subject settlement agreement. In fact, on one occasion when Denniberg called Benton and advised him that numerous customers were calling the District of Columbia Department of Motor Vehicles and threatening to fill out warrants for his (Denninberg's) arrest, Benton advised him that the best thing he could do was to contact his legal counsel for advice.

30. Denniberg signed the Agreement of Settlement in his office on August 28, 1979 after consulting with his two attorneys, Stephen Friedman and Paul Wolf, over a period of more than one week, and fully advising them of all of the pertinent facts known to him.

31. Denniberg's attorney, Stephen Friedman, never advised him not to sign the agreement and never thought that he was not functioning totally or within his full capacity. Friedman believed that Denniberg's unusual behavior was due to the pressures of the circumstances and was always able to discuss matters with him even after his atypical responses and outbursts. Friedman felt that Denniberg was rational at all times.

32. In September of 1979, Paul G. Smith, sales manager with the title of President of a Chrysler dealership in Fairfax, Virginia, refused to sign an agreement with plaintiff after

consulting with counsel although he was allegedly threatened with imprisonment by Benton.

33. And at the end of July, Denniberg refused to sign an agreement with plaintiff concerning the out-of-trust condition.

34. After the Agreement of Settlement was executed by Denniberg and Benton, the parties began performance of its terms; that is, Denniberg signed the voluntary surrender of assets letter and returned vehicles to plaintiff; plaintiff, in turn, performed an inventory audit, agreed to the dissolution of the restraining order, withdrew its claims for replevin and ceased prosecuting this action.

35. After August 30, 1979, Denniberg tried to obtain the monies called for in the agreement.

36. He was unsuccessful and on or about September 19, 1979, Denniberg attempted to have plaintiff accept a lesser settlement amount than that was called for in the August 29, 1979 agreement, but this proposal was refused.

37. Denniberg intended to fulfill the terms of the agreement of settlement at the time he executed it.

38. Paragraph 5 of the Agreement of Settlement required that plaintiff perform an inventory audit of the out-of-trust condition of Capitol Hill within ten business days with a copy to be provided to Denniberg so that he could verify the amount owing. All parties were to cooperate in the inventory.

39. Plaintiff performed the audit on August 31, 1979, with the assistance of Denniberg's office manager, Miss Rodriguez, who prepared her own listing.

40. Plaintiff's audit disclosed an amount owing of $333,000; Miss Rodriguez's tally reflected a figure of $233,000.

41. Denniberg knew of these results prior to September 10, 1979.

42. In September of 1979, Denniberg requested a written copy of the plaintiff's audit and he received it on October 22, 1979.

43. Denniberg took no action either to pay the sum reflected by his own audit or to attempt to verify the plaintiff's figures.

44. Capitol Hill received regular monthly computer reports which reflected information which was utilized in preparing the inventory audits.

45. During the period of his active management of Capitol Hill, Denniberg continually requested additional vehicles for sale.

46. Prior to signing the Agreement of Settlement, Denniberg knew that his dealership was out-of-trust and he knew, or should have known, that financed cars were sold during tenure while plaintiff held the certificates of origin pending repayment after each sale.

47. Denniberg was told by plaintiff that the certificates of origin would be released for each financed vehicle sold when plaintiff was paid from the proceeds of the sale.

48. At the time he executed the Agreement of Settlement Denniberg knew all of the material facts pertinent to that agreement; that is, he knew that he was responsible for repaying plaintiff the money owed by his dealership for the financed cars it had sold.

B. Conclusions of Law

1. This Court has jurisdiction over the parties and the subject matter of this suit. 28 U.S.C., Section 1332.

2. The law of the District of Columbia will be applied to determine the legal issues presented in this diversity action. Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938).

3. Duress has been defined in this jurisdiction as:

> [a]ny wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment.

Sind v. Pollin, supra, 356 A.2d at 652.

4. Here, Denniberg, although quite upset and concerned with the events relating to his dealership, was clearly not prevented from "exercising his free will and judgment" when he signed the Agreement of Settlement with plaintiff. Denniberg consulted with counsel prior to signing the agreement and one of those attorneys testified that he never advised Denniberg not to sign and never thought to question Denniberg's capacity or rationality.

5. Moreover, Denniberg's attempts, in September of 1979, to have plaintiff agree to accept a compromise payment on the Agreement of Settlement constituted a waiver of any objections to the agreement and a ratification of his obligation to pay, even assuming the existence of duress at the end of August. See, Horning v. Ferguson, 52 A.2d 116 (D.C. Mun. App. 1947); Williams v. Amann, 33 A.2d 633 (D.C. Mun. App. 1943). Denniberg's actions after August 30, 1979 demonstrate his intent to attempt to fulfill his obligations under the agreement. By having

waited to allege that this agreement was void until plaintiff sought specific enforcement, Denniberg was untimely.

6. The Agreement of Settlement expressly and unambiguously stated that it was intended to compromise the underlying civil action brought by plaintiff. Such agreements are highly favored by the law and are to be enforced under the general rules of contract law. Autera v. Robinson, 136 U.S. App. D.C. 216, 419 F.2d 1197 (1969).

7. The intentions of the parties to a contract are to be determined both by the words of their agreement and their actions. Bergman v. Parker, supra, 216 A.2d at 583.

8. Both Denniberg's actions and his acceptance of the clear language of the Agreement of Settlement demonstrate his intent to enter into a binding contract.

9. Paragraph 5 of the settlement agreement imposed a duty upon plaintiff to perform an inventory audit of the vehicles at Capitol Hill

and to provide Denniberg with a copy of each audit to enable him to verify the precise amount of the out-of-trust condition.

10. This portion of the agreement constituted a promise, which was initially substantially performed and later fully performed. There was no nonfulfillment of a condition precedent since there was no condition.

11. Moreover, even if this section of the Agreement of Settlement is construed as a condition precedent, plaintiff's delay in fully complying with its requirements could not nullify Denniberg's promise to pay. The contract itself was not conditioned upon the audit; that is, Denniberg's duty to pay was not dependent upon performance. Rather, the duty to verify the precise amount owed to Chrysler Credit had to await a particularized dollar claim. Only the obligation to verify was contingent upon the receipt of the written audit report. The promise to pay continued unabated.

12. At a minimum, Denniberg was obligated to pay the amount his own personnel had verified (e.g., $233,000) by September 17, 1979, and by October 22, 1979, he was obligated to verify and then pay the remainder due as was reflected in plaintiff's written audit.

13. A unilateral mistake can result in the recission of a contract where it is grave enough to make enforcement of the agreement unconscionable; relates to a material or essential part of the contract; does not arise out of negligence; and, would allow the other party to suffer no loss except the benefit of the particular bargain. See, 13 Williston on Contracts, Section 1544 (3rd Ed. 1970).

14. Denniberg has failed to establish that he was mistaken about any material portion of the Agreement of Settlement. That he later learned that plaintiff would sometimes forgive an out-of-trust condition, even assuming that this is accurate, does not change the fact that it choose to enforce its debts here.

15. Denniberg was advised by counsel and knew all of the material facts relevant to the agreement before he signed it. That is, he knew that he and his dealership owed plaintiff a substantial sum of money; he knew, or should have known, that plaintiff would release certificates of origin for the financed vehicles sold only when payment was received; and he knew that the agreement was to terminate his responsibilities and the litigation.

16. The Court concludes as a matter of law that the parties entered into a valid settlement of this action, that when Denniberg entered into the settlement on behalf of himself and Capitol Hill Dodge, that he did so voluntarily, and not under duress, and that the plaintiff is now entitled to have the settlement agreement enforced against the defendants. Autera v. Robinson, supra.

17. Taking all of the above matters into consideration, and in particular, the Court's

findings of fact set forth in Parts II, III, IV, V, VIA, supra, and its conclusions of law set forth in Parts II, III, IV, V, VIB, supra, the Court determines that the settlement is valid and should now be enforced.

An appropriate order has been entered.

Dated: December 7, 1982

/s/
JOHN GARRETT PENN
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2483, 82-2484 September Term, 1983

Chrysler Credit Corporation,

Appellee

v.

FILED SEP 14 1983

Capitol Hill Dodge, Inc.
and Elliot Denniberg,

Appellants

Before: WRIGHT, WALD and EDWARDS,
Circuit Judges.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O R D E R

Upon consideration of the record, briefs and arguments of counsel in this case, it is

ORDERED that the Orders of the District Court filed on November 12 and November 29, 1982, are affirmed for the reasons stated in those Orders and in the Memorandum Opinion of the District Court filed on December 7, 1982, and it is further

ORDERED that the case is hereby remanded to the District Court with instructions to

retain jurisdiction of this matter until the amount owed by the appellants under the settlement agreement is liquidated and the settlement agreement is fully performed.

Per Curiam

FOR THE COURT:

/s/
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2483 September Term, 1983

Chrysler Credit Corporation

v. Civil Action No. 79-01275

Capitol Hill Dodge, Inc. and Elliot Denniberg FILED OCT 13 1983

Appellants

And Consolidated Case No. 82-2484

BEFORE: Wright, Wald and Edwards, Circuit Judges

O R D E R

On consideration of the Petition for Rehearing of Appellants, filed September 28, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

For the Court:

GEORGE A. FISHER, CLERK

By: /s/
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2483 September Term, 1983

Chrysler Credit Corporation

v. FILED OCT 13 1983

Capitol Hill Dodge, Inc. and
Elliot Denniberg

Appellants

And Consolidated Case No. 82-2484

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia

O R D E R

The Suggestion for Rehearing en banc of Appellants, filed September 28, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

For the Court:

GEORGE A. FISHER, CLERK

By: /s/
Robert A. Bonner
Chief Deputy Clerk

No. 83-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITOL HILL DODGE, INC., *et al.*,
Petitioners,

v.

CHRYSLER CREDIT CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 1984

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the Court of Appeals erred in its unanimous per curiam affirmance of the District Court's opinion, based on facts in the record developed after two evidentiary hearings, holding that the parties entered in a valid settlement of respondent's diversity suit?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT RULE 17

Considerations Governing Review On Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

I. Introduction

Petitioners in this case, Capitol Hill Dodge, Inc., a former automobile dealership, and Elliot Denniberg, its Vice President, principal officer, and guarantor for the dealership's indebtedness, sold automobiles financed by Chrysler Credit Corporation without subsequently repaying Chrysler Credit for them. Their failure to repay was a breach of the trust receipts executed by Capitol Hill Dodge ("Capitol Hill", "Dealer" or "Dealership"), which required the Dealer to repay Chrysler Credit monies advanced for the purchase of vehicles. Upon petitioners' unfulfilled promises of repayment and unsuccessful recapitalization efforts, Chrysler Credit

brought the underlying suit in August, 1979, resulting in a temporary injunction of further car sales by petitioners. Ongoing negotiations between the parties resulted in a Settlement Agreement letter executed August 30, 1979 and stipulated to by court order August 31, 1979.

In the present litigation, Elliot Denniberg has attempted to renege on the Settlement Agreement by claiming that Chrysler Credit coerced him -- despite his consulting two attorneys prior to signing the Agreement -- into settling their differences. When Chrysler Credit moved to specifically enforce the Agreement, settlement terms not having been met, Denniberg retained new counsel and opposed the motion.

After two evidentiary hearings, the case having been remanded for further testimony and legal analysis, the Honorable John Penn, District Judge, held that the settlement was valid and should be enforced, on the grounds that Denniberg entered into the settlement on behalf of himself and the Dealership without duress, without mistake, and with an intent to make an unconditional promise to pay.

In upholding the validity and enforceability of the Settlement Agreement on the entire record before him, Judge Penn followed and applied authoritative precedents of the District of Columbia Court of Appeals and the U.S. Court of Appeals for the District of Columbia Circuit. Judge Penn reached his holding on

the basis of facts derived at least in part from Denniberg's own statements and contemporaneous documents.

On appeal, after full briefing and oral argument, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit, consisting of Circuit Judges Wright, Wald and Edwards, affirmed per curiam. After giving the issues on appeal full consideration, the Court stated that the District Court's orders were "affirmed for the reasons stated in those Orders and in the Memorandum Opinion" and remanded the case to the District Court "with instructions to retain jurisdiction of this matter until the amount owed by the appellants under the settlement agreement is liquidated and the settlement agreement is fully performed". Petitioners sought

rehearing and filed a suggestion for rehearing en banc. Both were unanimously denied, not a single member of the full Court requesting that a vote be taken on the suggestion for a rehearing en banc. (Orders denying rehearing and rehearing en banc October 13, 1983).

Petitioners have now reached the end of the line in their obdurate evasion of the duties encompassed in the August 30, 1979 Settlement Agreement. Not only is the Settlement Agreement valid and enforceable, as every judge who has considered the case agrees, but the question tendered to this Court is of the most narrow, limited, and localized scope, involving the application of District of Columbia law on contracts to a particular diversity case.

II. Background Of The Lawsuit

The relevant facts about the background of Denniberg's failure to abide by the Settlement Agreement are established by Denniberg's own statements and the statements of witnesses. The District Court documented the material facts in specific findings in its Memorandum Opinion of November 29, 1982.

Denniberg, an independent businessman, became a partner in Capitol Hill Dodge. He individually signed a Continuing Guaranty with Chrysler Credit October 11, 1978. (Pet. A-13, A-19.)[1/] Denniberg and Capitol Hill then executed wholesale promissory

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[1/] The opinion and judgment below are contained in appendices to the Petition and will be cited as Pet. App. _____. The Petition will be cited as Pet. ____.

notes and trust receipts, obligating them to repay Chrysler Credit monies advanced for the purchase of vehicles. (Pet. App. A-20.)

Prior to taking over active management of Capitol Hill Dodge, Denniberg knew that the Dealership was on financial hold. (Pet. App. A-25.) In June 1979, he took over active management of Capitol Hill from his partner Glen Covey, despite knowing of its financial troubles and despite being advised by Chrysler Credit to avoid taking over management. (Pet. App. A-24, A-25.) In July 1979, he freely put $50,000 into the Dealership. (Pet. App. A-25.) While actively managing Capitol Hill in mid-summer of 1979, Denniberg requested factory inventory, even though knowing that the Dealership was out-of-trust and unable to

repay $141,000, the amount then owed to Chrysler Credit on cars sold. (Pet. App. A-25, A-30.)

Chrysler Credit learned July 10, 1979 that petitioners had sold vehicles without repaying amounts financed, and demanded repayment without success. (Pet. App. A-20.) After July 10, 1979, Chrysler Credit took the certificates of origin for vehicles it had financed for Capitol Hill. It was understood that these certificates were to be released to the Dealership upon repayment of the proportionate amount borrowed when a vehicle was sold. (Pet. App. A-25, A-26.)

Petitioners were unable to repay Chrysler Credit as required to obtain the certificates of origin. (Pet. App. A-20, A-24.) Sometime after August 10, 1979,

Benton of Chrysler Credit told Denniberg that he could go to jail for not releasing certificates of origin to purchasers, explaining that he was referring to rights of customers to take action. (Pet. App. A-15.)

Chrysler Credit filed suit in August 1979 for breach of the trust agreements, and the trial court entered a temporary restraining order on August 17, 1979 enjoining petitioners from selling vehicles. On August 30, 1979, Denniberg and Chrysler Credit executed a Settlement Agreement which was "to fully and finally amicably resolve all of the issues which were or could have been raised" in this suit. (Pet. App. A-20, A-21.) Prior to

signing this Agreement, Denniberg consulted extensively with two attorneys. (Pet. App. A-14-A-18; A-27.)

The Court approved a Stipulation and Order August 31, 1979, whereby the TRO was dissolved, the proceedings stayed until September 17, 1979 in order to allow the Agreement to be performed, and petitioners became obligated to return financed vehicles to respondent and to execute a "voluntary return of assets letter". (Pet. App. A-5, A-21.) During this time, Denniberg tried unsuccessfully both to raise the settlement funds and to compromise the amount owed. (Pet. App. A-28.)

Paragraph 5 of the Settlement Agreement required Chrysler Credit to audit the Dealership's inventory within 10 days.

Chrysler Credit did so August 31, 1979, at which time petitioners' office manager prepared her own listing as well. Denniberg knew of the results of respondent's audit and his office manager's tally before September 10, 1979, and received a written copy of respondent's audit on October 22, 1979. Denniberg neither paid the sum reflected by his own audit nor verified Chrysler's audit. (Pet. App. A-29, A-30.)

III. The Opinions Of The District Court

The parties have agreed throughout the litigation that local, District of Columbia law is applicable in this diversity action. The parties have not disputed that the sole jurisdictional basis for the breach of

contract action was diversity of citizenship and the question was solely one of D.C. law, the trial court's task being to determine the application of D.C. law to the enforceability of the Settlement Agreement. (See Pet. App. A-8, A-19, A-31.)

Judge Penn proceeded to do just that, analyzing the relevant precedents in District of Columbia common law as applied by the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court of Appeals. On January 14, 1980, Judge Penn entered judgment for respondent and ordered specific enforcement of the Settlement Agreement. Upon petitioners' appeal, the U.S. Court of Appeals for the D.C. Circuit vacated the January 14, 1980 Order and remanded the case for the taking

of further testimony and for the District Court to reach explicit conclusions on all four substantive defenses raised by the petitioners. (Pet. App. A-22, A-23.) Accordingly, on remand Judge Penn entertained additional testimony and thoroughly explained the Court's conclusions on each of petitioners' four substantive defenses. He again ordered specific enforcement of the Settlement Agreement and entered judgment in respondent's favor. (Pet. App. A-23, A-4-A-37.)

In reaching the appropriate conclusions regarding petitioners' four defenses, Judge Penn concluded, explicitly and implicitly, that the governing precedents of the U.S. Court of Appeals for

the D.C. Circuit and the District of Columbia Court of Appeals were entirely consistent.

First, Judge Penn found that Denniberg was not deprived of the exercise of his free will and judgment and that the alleged "duress" was not persuasive; relying on Sind v. Pollin, 356 A.2d 653, 656 (D.C. 1976) ("any threat...that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment"). No decision of the D.C. federal courts has been found which conflicts with the Sind holding.

Judge Penn also found that Denniberg showed intent to perform after discovery of the relevant facts, and thus was untimely in seeking to rescind the Settlement

Agreement. Judge Penn relied on Williams v. Amann, 33 A.2d 633 (D.C. 1943) and Horning v. Ferguson, 52 A.2d 116 (D.C. 1947) (one who seeks to rescind a contract for duress or fraud in the inducement must elect to rescind or perform after discovery of facts justifying rescission, and if electing to perform, makes a new contract). These cases are consistent with the law of the D.C. Circuit Court of Appeals. See Mariner Water Renaturalizer of Washington, Inc. v. Aqua Purification Systems, Inc., 665 F.2d 1066 (D.C. Cir. 1981) (Under District of Columbia law, one who seeks to rescind a contract must act within reasonable time after discovery of facts justifying rescission).

Second, the District Court found unpersuasive the defense that Denniberg lacked intent to contract. In reaching this conclusion, Judge Penn relied on consistent federal and local decisions. Bergman v. Parker, 216 A.2d 581, 583 (D.C. 1966) (intentions of the parties to a contract are to be determined by both the words of their agreement and their actions); Autera v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969) (settlement agreements are highly favored by the law and are to be enforced under the general rules of contract law).

Third, the District Court found the defense of nonfulfillment of a condition precedent legally inadequate. Judge Penn relied on Bergman v. Parker, 216 A.2d 581, 583 (D.C. 1966) for the rule that a

condition precedent, as distinguished from a promise, is a fact, other than the passage of time, which must exist before a duty of immediate performance of a promise can arise. Bergman is consistent with Emersons, Ltd. v. Max Wolman Co., 388 F.Supp. 729, aff'd 530 F.2d 1093 (D.D.C: 1975) (courts traditionally refuse to interpret ambiguous conditions in contracts as "conditions precedent").

Fourth, the District Court rejected the defense that Denniberg's unilateral mistake nullified the Settlement Agreement. Finding no mistake as to any material portion of the Agreement, Judge Penn relied on 13 Williston on Contracts Section 1544 (3d ed. 1970) for the proposition that in order for uni-lateral mistake to warrant rescission of a contract, it must relate to

a material part of the contract and be so serious as to make enforcement of the contract unconscionable. No decision of the D.C. courts, whether local or federal, has been found which conflicts with Williston on this point.

Petitioners are flatly incorrect in stating that Judge Penn "abused [his] discretion by erroneously ignoring all evidence of duress, coercion and fraud", and that he "failed to perceive and understand that economic pressure, poor business conditions and threats of criminal prosecution do constitute duress and coercion." (Pet. 21.) Judge Penn did no such thing, as his opinion makes clear. He stated that "[a]fter carefully considering the evidence in this case, including the testimony of Denniberg, Benton, Paul Smith-

and Stephen Friedman, Denniberg's attorney, the Court finds no evidence to support the defendant's claim of duress". (Pet. App. A-13.) He accounted for the testimony of Paul Smith, as directed to by the D.C. Circuit Court of Appeals, specifically finding that despite the alleged threats made against him, Smith refused to sign an agreement with Chrysler Credit. (Pet. App. A-27, A-28.) He also specifically found that no agent of Chrysler Credit threatened to put Denniberg in jail, Benton having explained to Denniberg that his criminal exposure was in reference to rights of customers to take action, and that his best recourse was to seek legal advice. (Pet. App. A-14-A-16, A-23, A-26, A-32.) Judge Penn further found that the only other specific allegations of fraud and

duress concerned economic pressure, and since that the evidence showed that the economic pressure was of Denniberg's own making, proof of duress was inadequate as a matter of law. (Pet. App. A-14, A-24, A-32, A-36.)

Petitioners are further incorrect in making other unfounded and loose-ended assertions that are not even correlated to the factual findings of Judge Penn. For example, petitioners posit that no mutually agreed upon figure has ever been calculated for the audit of their inventory, and that it is presently impossible to audit or verify what the inventory was in August 1979. They further state that no credible evidence is before the District Court from which a calculation can be made. (Pet. 25.)

In contrast, Judge Penn found that (1) the petitioners knew that both the respondent and the petitioners' office manager performed audits, (2) petitioners knew of the figures resulting from both audits prior to September 10, 1979, and (3) the petitioners took no action to pay the sum reflected in their own audit or to verify the respondent's figures. (Pet. App. A-29, A-30.) On the basis of these findings, Judge Penn held that petitioners, upon receipt of respondent's written audit on October 22, 1979, became obligated to verify and then pay the amount reflected in respondent's audit. (Pet. App. A-34, A-35.)

Petitioners also state with no foundation whatsoever that "Chrysler Credit further exhibited a willingness to inflect

duress and coercion by its apparent offering of a dealership to Defendants' witness, Paul Smith, if he did not testify on behalf of Defendant Denniberg". (Pet. 21.) This is nothing more than brazen speculation, devoid of any basis in fact or in the record.

Suffice it to say that with regard to the evidentiary rulings in this case, petitioners' scatter-shot approach does not even address the application of the clearly erroneous standard which must be applied to Judge Penn's decision. Pullman-Standard v. Swint, 456 U.S. 305, 313 (1982) (a trial court's factual findings may not be set aside unless clearly erroneous). The petitioners are wrong to reargue the facts at this late date; there simply is no basis in the record or in their arguments from

which this Court could conclude with certainty that Judge Penn erred on the facts.

In sum, the District Court held, on the basis of Denniberg's own statements and admissions, the statements of other witnesses, and relevant documents, that petitioners entered into a valid and enforceable settlement of this action, voluntarily and without duress.

IV. The Court of Appeals Decision

The unanimous per curiam affirmance by the Court of Appeals, J.J. Wright, Wald and Edwards, was rendered after extensive briefing by the parties, oral argument and full consideration by the Court. (Pet. App. 1.) In affirming the decision below,

the Court relied upon its Local Rule 13(c), which allows the Court to dispense with written opinions in appropriate cases.

The Court, after reviewing the District Court's opinion and the extensive record on appeal, concluded that the District Court had properly applied the governing principles in its disposition of petitioners' case. No question of general applicability was discerned by any member of the panel, nor did any of the ten active judges of the full Court even request a vote on the suggestion for rehearing en banc.

REASONS FOR DENYING THE WRIT

None of the criteria enumerated by this Court (see Supreme Court Rule 17) for discretionary review on certiorari of the decision of a federal court of appeals is remotely approached here. The narrow and particularized question of local law application involved here does not warrant consideration by this Court.

1. Petitioners do not assert that this case involves a conflict of circuits. No such conflict could arise, since the issue is only the application of D.C. common law on contracts to a case brought in the District of Columbia.

Nor is there a conflict as to a question of federal law asserted between the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court

of Appeals. To the contrary, the decisions of these two courts are entirely consistent. The decision of the U.S. Court of Appeals upholding Judge Penn's decision, relying extensively on precedents of the District of Columbia Court of Appeals, means that there is uniformity and consistency between the local and federal courts in the District of Columbia in interpreting this aspect of D.C. law, just as there should be.

2. There is no important question of federal law here requiring settlement by this Court. Indeed, there is no question of federal law of general applicability in the federal system, much less any issue of importance. The only issue relates to the application of D.C. common law on contracts to a particular lawsuit. There was no

federal constitutional issues addressed by the Courts below. There are no conflicts of authority at all, much less a conflict with any applicable decision of this Court.

This Court has consistently adhered to the principle that decisions on issues of such localized character by the courts of the District of Columbia do not merit review by this Court. As the Court stated in Pernell v. Southall Realty, 416 U.S. 363, 366 (1974):

> "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application."

That this case involves no issue of general importance was recognized by the Court of Appeals when it implicitly decided that the issues presented occasioned no need for an opinion in accordance with its Local Rule 13(c).

3. There is no need to reargue here the correctness of Judge Penn's decision or that of the Court of Appeals affirming it. Suffice it to say that Judge Penn gave all parties a full and fair opportunity to be heard; he dealt comprehensively and carefully with each of petitioners' contentions; he analyzed the controlling legal authorities and carefully applied them to the issue before him; and a Court of Appeals of wide experience unanimously agreed that his decision was so clearly correct as not even to require discussion

in an opinion. The case was fair and efficient in decisionmaking at both the trial and appellate levels, and every judge who has scrutinized the issue has come to the same conclusion that petitioners voluntarily entered into and valid and specifically enforceable settlement Agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITOL HILL DODGE, INC., *et al.*,
Petitioners,

v.

CHRYSLER CREDIT CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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MOTION OF RESPONDENT FOR DAMAGES

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TABLE OF AUTHORITIES

MOTION OF RESPONDENT FOR DAMAGES

Respondent, Chrysler Credit Corporation, by counsel, respectfully moves that this Honorable Court grant respondent an award of damages, pursuant to Supreme Court Rule 49.2, for the reasons set forth below.

Supreme Court Rule 49.2 provides that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or respondent appropriate damages". Petitioners' petition for writ of certiorari is clearly frivolous, and is brought only for the purpose of delay without reasonable cause.

The power of this Court to award damages to discourage frivolous appeals and petitions for writs of certiorari is long

standing. In 1876, this Court stated that "[w]e can adjudge damages... in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals and frivolous writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time". Armory v. Armory, 91 U.S. 356 (1876). Similarly, in Texas & Pacific Railway Company v. Volk, 151 U.S. 73, 75 (1894), this Court stated that where a writ of error appeared to have no plausible ground to support it, it would be assumed that it was sued out for the purpose of delay, and damages would be awarded. See also Whitney v. Cook, 99 U.S. 607 (1879)

(parties should not be subject to delay without reasonable cause, and the power to compensate for unwarranted delay ought not to be overlooked).

This venerable power of the Court to award damages is embodied in Supreme Court Rule 49.2. The Court continues to exercise its power to award damages pursuant to this rule. See Tatum v. Regents of the University of Nebraska-Lincoln, 77 L.Ed.2d 1346 (1983) (damages awarded to respondents in the amount of $500.00 pursuant to Supreme Court Rule 49.2); Garcia v. United States, 77 L.Ed.2d 1346 (1983) (The Chief Justice, Justice Rehnquist and Justice O'Connor would award respondent damages pursuant to Supreme Court Rule 49.2); Gullo v. McGill, 77 L.Ed.2d 1328 (1983) (The Chief Justice, Justice Rehnquist and

Justice O'Connor would award appellees damages pursuant to Supreme Court Rule 49.2).

The petition for writ of certiorari of Denniberg and Capitol Hill Dodge, Inc. has no plausible ground to support it. The petitioners formulate no issues of law, and do no more than reargue the facts without even discussing the "clearly erroneous" standard which must be applied to the decision below. Pullman-Standard v. Swint, 456 U.S. 305, 313 (1982) (a trial court's factual findings may not be set aside unless clearly erroneous). Not only do petitioners reargue the facts, but they do so knowing that this case has already had the benefit of two evidentiary hearings by the Honorable John Penn, District Judge for the District of Columbia, and the benefit

of review by the ten active judges of the full U.S. Court of Appeals for the D.C. Circuit. Not a single member of the full Court requested that a vote be taken on the suggestion for a rehearing en banc. (Pet. 12-14; Pet. App. A-40, A-41.)[1/]

Petitioners do not formulate or discuss a single legal issue in the twenty-eight pages of text in their petition. Although petitioners summarily invoke the Fourteenth Amendment to the Constitution of the United States, they do not mention it in their "Reasons for Granting the Writ", and fail to cite any other legal authority in support of their

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[1/] The opinion and judgment below are contained in appendices to the Petition and will be cited as Pet. App. ____. The Petition will be cited as Pet. ____. The Opposition to the Petition will be cited as Opp. to Pet. ____.

reasons. (Pet. 3, 17-27.) Petitioners further omit any reference to the considerations governing review of certiorari, as provided under Supreme Court Rule 17, and could not satisfy any of these considerations even if they had discussed them. (See Opp. to Pet. 22-25.)

Petitioners have obdurately evaded the duties encompassed in the August 30, 1979 Settlement Agreement for several years. The petition for writ of certiorari is consistent with their history of evasion, and no reason other than delay appears to have caused the petitioners to seek review by this Court. As this Court once stated, where a writ appears to have no plausible ground to support it, it will be assumed that it was filed with the purpose of

delay, and damages will be warranted. Texas & Pacific Railway Company v. Volk, 151 U.S. 73, 75 (1894).

In sum, petitioners have sought review in this Court for frivolous reasons and respondent accordingly seeks damages, both for delay and the necessity of responding to the petition for writ of certiorari.

WHEREFORE, respondents respectfully pray that this Honorable Court award damages to them, pursuant to Supreme Court Rule 49.2, and such further relief as may be deemed necessary.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1983

CAPITOL HILL DODGE, INC., et al

Petitioners

v.

CHRYSLER CREDIT CORPORATION

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

OPPOSITION BY PETITIONERS TO MOTION FOR DAMAGES

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TABLE OF AUTHORITIES

OPPOSITION BY PETITIONERS TO MOTION FOR DAMAGES

Petitioners, CAPITOL HILL DODGE, INC. and ELLIOT DENNIBERG, by counsel, respectfully move that this Honorable Court deny Respondent's Motion for Damages in all respects for the reasons set forth below.

Supreme Court Rule 49.2 states that "when an appeal or Petition for Writ of Certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages" (emphasis added). Petitioners' Petition for Writ of Certiorari is not frivolous and damages should not be awarded to Respondent.

This Court has developed standards of which to test a Petition for "frivolousness." These standards are met in only a few rare cases. A "frivolous" Petition is one in which the Petitioner "had no defense." Prentice v. Pickersgill, 73 U.S. 511 (1868). A "frivolous" Petition has "no plausible grounds," Texas & P.R. Co. v. Volk, 151 U.S. 73 at 75 (1894), and the "inference would seem to be irresistable"

that delay was the only motive. Barrow v. Hill, 54 U.S. 54 at 56 (1852) (emphasis added).

These standards are clearly not met in the case at hand. Petitioners argue throughout their Petition that the District Court's findings were "clearly erroneous." Petitioners may have had the benefit of two evidentiary hearings but both hearings were before the same finder of fact, the Honorable John Penn, United States District Judge for the United States District Court for the District of Columbia, and on both occasions Petitioners' opportunity to present evidence was severely and wrongfully limited.

The decision of the Honorable John Penn, resulting from Petitioners' first evidentiary hearing on or before the 25th and 26th days of October 1979, was reversed by the United States Court of Appeals for the District of Columbia Circuit explicitly on the grounds that evidence presented by Petitioners had been wrongfully excluded (R-650-655).

At Petitioners' second evidentiary hearing on or about the 28th day of May 1981, the Honorable John Penn again excluded material and relevant evidence and refused to take into account the content and credibility of the testimony the Court of Appeals had ordered to be heard.

Petitioners satisfied completely the requirements of Supreme Court Rule 17 and presented various questions of evidentiary law and due process. Petitioners set forth numerous examples of "arbitrary and capricious" and "clearly erroneous" behavior by the Courts below.

Should Petitioners' Petition for Writ of Certiorari be denied, Respondent will be compensated for any delay in interest and Petitioners, along with Respondent, were forced to incur substantial expense in order to file their Petition.

WHEREFORE, Petitioners respectfully request that this Honorable Court deny Respondent's Motion for Damages in all respects and further

grant a Writ of Certiorari and reverse and vacate the Orders of the United States District Court for the District of Columbia dated November 12 and 29, 1982, and further grant to Petitioners such other and further relief as may be just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, this 12th day of March 1984, to John T. Coyne, Esq., Jordan Coyne Savits & Lopata, 1030 15th Street, N.W., Wash., D.C. 20005.

Jeffrey M. Frost